No. 9196

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANT & RUSSELL, INC., a Corporation,
Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY, a Corporation,
Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

BAYLEY & CROSON,
ALLEN H. McCURTAIN,
M. N. EBEN,
Attorneys for Appellant.

KILHAM STATIONERY & PRINTING CO., PORTLAND, ORE.

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ARGUMENT

Appellee in attempting to meet and refute the logic of appellant's brief, in connection with the construction to be accorded the contract itself, has made an analysis found beginning with the second paragraph on page 26, and ending at the middle of page 31 of appellee's brief. Before proceeding to a discussion of authorities quoted by

appellee, it is deemed advisable to comment upon this portion of appellee's brief. Appellee contends that the 30-day clause quoted on page 26 of its brief, clearly shows an understanding of the parties that without such a provision the seller would not be bound to deliver, and the buyer would not be bound to accept delivery after the date specified therefore in the contracts. We are at a loss to understand how this clause shows such an understanding, in view of the other provisions of the contract, and, particularly in view of the fact that the time element feature of the contract had been previously expressly waived by the excusing of delays caused by strikes. No clause was necessary to impose upon the buyer the duty to accept a delayed shipment. The contract itself without this 30-day clause, we believe to have been an undertaking made in contemplation, and expectation of delays, and one, which by their choice of language, the parties evidenced an intention to fulfill after delays, otherwise as previously argued in appellant's brief, why not simply say the contract ends upon the happening, or the continuance of such an impediment?

We believe it cannot be fairly said, in view of the fact the seller was not to be liable for delays, that time was, nevertheless, of the essence thereof. To say further, that by making the matter optional with the seller, the parties emphasized the fact that no "obligation to perform vested upon the seller" is to beg the question. Naturally, if performance

after the impediment was removed was optional with the seller, no obligation to perform vested upon the seller. The question, however, is, *was the matter optional with the seller,* and *was the seller obliged to perform within a reasonable period of time?* As contended in our first brief, a condition might have arisen whereby 10 days would have been an unreasonable delay, so that after 10 days, the buyer could not have demanded delivery but the seller, under the real meaning of the 30-day clause, could have forced the buyer to take for a period of 30 days. It does not, therefore, follow, as claimed by the appellee, that the clause is meaningless, if the seller be held bound to perform after the strike.

Counsel has next indicated that in stating the proposition, that impossibility of performance of the contract does not excuse the promissor, we have overlooked the qualifying rule, that the contract may provide against the contingency of impossibility, and if it does, performance will be excused, if the specified conditions occur, and in fact prevent performance. Perhaps we have failed to state specifically that the contract may provide an excuse to the promissor for impossibility of performance. It cannot, however, be contended that we have overlooked this qualifying rule, because we have devoted a good portion of our brief to an analysis of the express provisions of the contract, in an attempt to determine, whether or not, its wording expressly or by implication in the contract, accorded to the seller the claimed protection.

It would seem also, that appellee recognizes the logic of our reasoning to that end. In stating the qualifying rule, appellee has concluded the italicized portion of his statement with the phrase, "and in fact prevents performance." We believe it cannot be shown that the strike prevented performance, except at the stated time therefor. Appellee must argue that when a strike prevents timely performance, it does, in fact, prevent all performance. It is difficult to see the logic of this argument, where the parties have chosen language relieving the seller from liability for delay, *in preference to language clearly calling the contract at an end,* upon the happening of the strike, and continuance beyond the delivery date.

It is next contended by appellee, regarding the war cancellation privilege, that it has no bearing upon the interpretation of the contract regarding the present controversy, for the reason that the provision regarding the right of cancellation in event of war, is an entirely separate one from the strike clause, and for the additional reason "the appellee is not asserting any right to a technical cancellation of the contract, as it might in a case of war, but rather simply asserts that the law has permanently excused performance." As to the first of these propositions, we can not agree that the provisions regarding war and strike are separate provisions. It is first said, there will be no liability, for delay, or non-shipment caused by strikes, war, etc. It is next said, "we may cancel in the event of war." Let us take the example of

a boy with two fish. One of the fish was large, necessarily implying, we believe, that the other was not. One of the fish was a trout, necessarily implying, we believe, that the other was not. One of the fish was caught by him, necessarily implying that the other was not. One of the fish is dead, necessarily implying that the other still lives. And so, with the war clause. The stated privilege of cancellation in the event of war, necessarily negatives a corresponding privilege in connection with any of the other impediments. Why should there be a clause in the contract giving the seller the right of cancellation in the event of war, when, if the appellee's interpretation of the other previous provisions of the contract is correct, it already had that right upon the continuation of the war beyond the delivery date.

It is axiomatic that the contract is viewed from its four corners, and that every provision in it bears upon every other provision. It is particularly appropriate to mention that these so-called special provisions are all a part of the general conditions clause, and are all dealing with impediments to performance. These general conditions are simply one subject matter. As to the second of his so-called final answers, we believe that it states a distinction without a difference. We are unable to view the happy phrase "permanently excused" as having any different practical effect, than the right of cancellation, accorded the seller in event of war. It all adds up to the same answer, the buyer doesn't get his logs. In analyzing the

contract as to the claimed privileges in the event of war, or strike, we still have the condition contended for in our first brief. If the contract had intended that the buyer shouldn't get the logs in the event of strike, why didn't it say, "in the event of war * * * strikes, and 16 other clauses, the buyer doesn't get the logs"? Whether it be a permanent excuse, a default under the contract, a privileged cancellation, or whatever it may be, we are unable to see the distinction claimed by appellee.

We are at a loss to understand the contention of the appellee, that we are claiming a benefit from the so-called 30-day clause. We do not now, nor have we in our first brief, advanced the contention that the clause was inserted in the contract for the benefit of the buyer, or that it aided our position. We do not contend that this clause imposed an obligation upon the seller to perform. We have only sought to explain the real meaning of the clause in relation to the other portions of the contract.

We recognize, of course, as stated by appellee, page 30 of its brief, that the extent of the increase of freight rates after the strike, is of no consequence in the case. We believe, however, that the fact of a nominal increase in the freight rate shortly after the termination of the strike, coupled with the refusal of the seller to commit itself, or to definitely refuse shipment, has a considerable bearing upon the proposition of estoppel.

As had been anticipated, appellee claims we cannot invoke the doctrine of estoppel, for the reason it was not pleaded. A fair construction of appellee's answer, indicated its reliance upon those terms of the contract relating to non-shipment, and non-delivery, as being the privilege claimed by it. To this contention, estoppel is not a defense. At no place in the answer is there any contention made that the delay caused by the strike was unreasonable, and it is to bar such a claim at this time, that the doctrine of estoppel is discussed, and, as to which we have previously said, the opportunity to plead estoppel never arose. Counsel further says in this connection, that in any event we would not be entitled to the benefit of the doctrine, because of a failure to show a reliance upon conduct of the seller to our damage. It is believed that this proposition is answered by the appellee's own argument of a freight increase from 87½c to $20.00 a thousand, during the period when the buyer was attempting to get a commitment, either of liability or non-liability from the seller.

As to the authorities cited by both parties, regarding the interpretation of this contract, we find some difficulty in agreeing with appellee, that ours represent a minority view. On the other hand, with few exceptions, we will undertake to distinguish appellee's authorities for the most part by reference to the wording of the contracts to which they relate. It will be found, we believe, that appellees claim to have embraced the majority view is not well taken.

It is further interesting to note that counsel for the appellee has completely failed to distinguish appellant's authorities from the case at bar. It is likewise interesting to note, that the courts, in all cases cited by appellee, have failed to overrule the authority of appellant's citations, but in each of those cases, as will be hereinafter shown, have found a feature upon which to base their judgment that is not found either in the case at bar, or in appellant's authorities. We believe there may be found some apt sounding phrases and expressions, from which appellee may take comfort. We are not able to agree, however, that the apt sounding phrases determine the issues in these cases.

ANALYSES OF APPELLEE'S AUTHORITIES RE INTERPRETATION OF CONTRACT

We now proceed to a discussion of appellee's authorities.

Williston on Contracts, Section 1968.

Appellee's quotation of the authority is correct. It seems advisable, however, to add to the citation additional matters found therein:

> "It has become common for manufacturers and others to insert in their contracts clauses relieving them of liability, in case of strikes and other unforeseen casualties. The words of these clauses are not identical, and it can only be said that while such agreements are legal, it is essential to prove that a strike or

> casualty, within the terms of the clause in question, was the *actual cause* of non-performance."
>
> (Italics ours.)

We call attention in appellee's citation, to the words "and excuse the promisor from performance." This, of course, is the issue in this case. The citation, therefore, begs the issue. It will also be recalled, that the last words of the citation are "unless the contract provides that delay only shall be excused." Our contracts provide that delay shall be excused if caused by strikes, beyond the seller's control. Our contracts further provide that non-shipment and non-delivery shall be excused if caused by strikes or other conditions beyond the seller's control. There can be no delay in shipment until after the last day of the last month specified for delivery, so that it must be held that the delay anticipated is after the end of the delivery date in the contract. This delay then is expressly excused. We believe it cannot be said then, with the delay excused, and timely performance out of the way, that non-shipment and non-delivery were rendered impossible under the terms of the contract by the strike. Therefore, under the wording of the contract, we do not find a clause which has "become operative and excuses the promisor from performance," but rather a situation covered by the first part of the citation, wherein it is stated, "It is essential to prove that a strike or a casualty within the terms of the clause

in question, was the actual cause of non-performance."

We will next discuss the cases in the order in which appellee has treated them.

Kunglig Jarnvagsstyrelsen vs. National City Bank (C. C. A. 2), 20 F (2d) 307.

The terms of the contract itself are determinative in this case. A distinguishing element of this contract, was that shipments under the contract were expressly to be completed within six months, and that shipments were to be made at approximately 30,000 tons per month. The court stated as cited by appellee, that the contract had an express limitation of six months, and likewise "they were restricted by the terms of the contract to deliver 30,000 tons per month." The court properly refused to so construe the contract, as to require against the express terminology of the contract, the entire tonnage to be delivered during the last two months, where the entire tonnage was in excess of 60,000 tons.

Hull Coal and Coke Co. (C. C. A. 4), 113 Fed. 256.

In quoting from this case, counsel has said simply the undertaking was subject to a strike clause providing that "deliveries herein contracted for may be suspended or partially suspended in event

of stoppage of the works of the defendant by any strike." In point of fact, there was considerably more to the strike clause than quoted. As is stated at page 258 of the Federal Reporter, this additional matter was a part of the strike clause, "or at the option of the party not in default may be immediately cancelled during the continuance of such interruption, by immediate notice to that effect given to the other party." In this case, the buyer was in default, and the seller cancelled for that reason. There is an additional distinguishing feature. The contract provided for the sale of the entire output of ovens between January 21 and December 21, the purchaser, in fact, got the entire output, although not as much as the guarantee called for. The court further held that whatever the output of the ovens was during that period of time, belonged to the purchaser, whether it was big or small, that the period of time itself was expressing the limit of the contract, and that consequently the seller had no opportunity of making up any deficiency during the period when it had placed its ovens at the disposal of the buyer.

A distinguished rule is stated in appellee's own citation, which he has italicized:

> "Where the intention of the parties to limit a contract to a certain period is manifest, it is of the essence of the contract."

Atlantic Steel Co. vs. R. C. Campbell Coal Co. (U. S. D. C. Ga.), 262 Fed. 555.

This contract covered a long period of time. The requirements of the Atlantic Steel Company, plaintiff, were 1000 tons of coal per month, and the contract called for 12,000 tons per year, for a three-year period to be delivered 1000 tons each month. It would seem fairly clear that where a buyer was buying for his own current requirements, coal to operate his plant for a definite period of time, there would be no reason for requiring seller to make up deliveries impeded by an excusable condition, after the impediment had ceased to exist. Obviously a buyer could not be required in September, to accept coal needed for the operation of its plant the preceeding June, and, under these circustances, the doctrine of mutuality would not permit a remedy in favor of the buyer against the seller, arising from the same state of facts. The case is further distinguishable, in that it concerns a severable contract, so interpreted by the plaintiff buyer, in a letter of January 31, 1917. The court finds the consideration to have been severable, payment being made each month for each month's delivery, and so holds the contract to be severable. There can be no severable element in the several contracts in the case at bar. There is only one delivery, or one period for delivery specified in each of the contracts.

Edward Maurer Co. vs. Tubeless Tire Co. (C. C. A. 6), 285 Fed. 713.

In this case, the court finds that there was a prospect of a two-year delay, and that it would be unreasonable to suppose the parties intended their contract to abide a delay so long and uncertain. It is stated by the court:

> "The contract is its entirety is made subject to force majeure. It is not deliveries only, but the contract obligation itself, which is thus made to depend upon these conditions."

In this contract it is provided:

> "This contract is subject to all the rules and regulations * * *."

and further:

> "This contract is subject to force majeure, strikes, etc."

This is a far cry from the terms of the contract in the case at bar, where only delay or non-shipment and non-delivery caused by strike are alone excused. In this case also, the court points out that it has clearly appeared:

> "That the defendant, with full knowledge and understanding on the part of the plaintiff, was intending and attempting to buy rubber for delivery ta specific times to meet its factory requirements in war times, and at war prices, and was not intending to contract for large amounts of rubber in gross. * * * At the time these contracts were written, no one could prophesy the end of the war. It was then generally believed that the war might last for several years."

In the case at bar, the anticipated duration of a strike would not have been bounded by years, but rather by weeks, which is a far different condition.

Indiana Flooring Co. v. Grand Rapids Trust Co. (C. C. A. 6), 20 F. (2d) 63.

The contract contained the provision: "All agreements and contracts are contingent upon strikes, fires * * *." A fire occurred.

Here is another instance in which the contract itself, by its express terms was to be in its entirety contingent upon strikes, fires, etc.

Normandie Shirt Co. vs. J. H. and C. K. Eagle, 238 N. Y. 218, 144 N. E. 507.

This case, for which appellee claims a similarity of strike clauses with the case at bar, is in no sense similar, in that by its express terms, the contract in the cited case states:

> "Strikes * * * preventing the delivery of merchandise in accordance with the terms of this contract, shall absolve the seller *from any liability hereunder.*"
>
> (Italics ours.)

Here again all liability is at an end, upon the happening of a strike preventing delivery in accordance with the terms of the contract. Whereas in

the case at bar *instead of all liability the seller is released only from liability for delay, or non-delivery, and non-shipment actually caused by strikes.*

There will be found, in the citation of the appellee herein, the distinction above indicated, wherein the court states:

> "It shall be absolved from 'any liability hereunder' * * * not merely liability from delay, but from any liability which would include failure to deliver at all."
>
> *Black and Yates, Inc., vs. Negros-Philippine Lumber Co.,* 32 Wyo. 248, 231 Pac. 398.

In the cited case, the contract was made in 1916, and performance was impeded for a period of three years. The court very properly held that a three-year delay was an unreasonable delay, a contention not advanced in connection with the case at bar. It will be recalled that we have never claimed that an unreasonable excused delay would leave the parties bound to performance. Appellee recognizes, in quoting from this case at the top of page 21 of its brief, that the case does not intend to hold the promiser could be relieved altogether, where only a delay of short duration is caused by the impediment to performance.

> *Ladd Lime and Stone Co. vs. MacDonald Construction Co.,* 29 Ga. App. 116, 114 S. E. 75.

In this case, the contract provided:

> "This contract shall expire by its own limitations on January 31, 1920, and the court held that the express expiration date of the contract controlled all other provisions therein."

There is no such expiration date in the contracts at bar.

> *General Commercial Co. vs. Butterworth-Judson Corp.,* 191 N. Y. S. 64.

The case clearly distinguishes between a contract being contingent upon a strike, and a case wherein delivery is contingent upon a strike. The contract provision itself provided:

> "This contract is contingent upon strikes * * *."

> *Metropolitan Coal Co. vs. Billings,* 202 Mass. 457, 89 N. E. 115.

The contract provided that the seller was "to furnish the defendant's house at number 409 Marlboro Street with *such quantity of coal as can be delivered prior to November 1st.*" The undertaking itself in this case was an expressly limited one.

Other cases have been cited by the appellee, but not discussed. We briefly call attention to the distinguishing characteristics of the cited cases.

New England Concrete Construction Company vs. Shepherd and Morse Lumber Company, a Mas-

sachusetts case, 107 Northwestern 917. Contract provided: "All contracts are contingent upon strikes * * *."

Hoskins Trading Company vs. Pfeifer and Company, a Louisiana case, 130 Southern, page 469. The contract provided: "All agreements are contingent upon strikes, delays of carriers, and other causes unavoidable, and beyond our control."

Obear-Nester Glass vs. Mobile Drug Company, an Alabama case, 87 Southern 159. The contract provided: "The seller agrees to take all reasonable care and diligence in filling this contract, but shall not be responsible for any delays or non-shipment, resulting from acts of providence, strikes, lockouts, fires, floods, or any accident or contingency beyond its control." The agreement further provided: "Shipments to be made as follows, in carload lots, *at specified dates, between the date of contract and July* 31, 1916." The court held that here was an express provision limiting the life of the contract.

(Italics ours.)

Summarizing briefly, it will be seen that in all cases cited by appellee, one or more of the following distinguishing characteristics were present:

1. The contract was *expressly* limited to a definite period of duration.

2. There was a purchase for current use and consumption by a manufacturer.

3. There was an *express* condition in the contract authorizing either cancellation or freedom from any liability.

4. There was an actual or prospective delay of unreasonable duration.

5. The contract itself, in its entirety, and not merely delivery, was *expressly* subject to, or contingent upon strikes, etc.

ANALYSES OF APPELLEE'S STATEMENT OF CUSTOM AND USAGE

Appellant has no quarrel with the general law cited by appellee, on the doctrine of custom and usage. We will reply chronologically to the arrangement adopted by appellee, beginning on page 31 of appellee's brief.

It is not the appellant's claim that custom and usage sustains our interpretation of the contract, despite its language, but only that on account of the failure to negative such known general custom and usage, it therefore becomes an element which the parties must have known, and had in mind, along with the other circumstances surrounding the execution of the contract, and hence that upon their failure to negative its application, it becomes important and controlling in interpretation.

We agree, as is stated on page 32, under the *Williams vs. Ninemire* citation, that a clear, cer-

tain and distinctive contract is not subject to modification, by proof of custom and disposes of all customs and practices by its own terms. The contract in the case at bar has been the object of intense study, by laymen and lawyers. It not only fails to speak clearly and certainly on the question of cancellation, by operation of a strike provision, but it fails to speak at all to the effect of cancellation, or to use appellee's phrase, "permanent excuse for performance." It therefore leaves the parties on the particular point, with the generally known custom and usage of the trade as the sole guide to the question of responsibility to make shipments after the termination of the strike. Why isn't it logical, since the parties have excused delay by strike, to permit custom and usage to settle the question, particularly where that custom and usage, as previously demonstrated, is in harmony with the general law on the subject? We would say this answered the requirements of the Williams case, wherein it states: "such proof is then admissible only for the purpose of finding out what the contract really was, and not to overthrow it."

On page 33 of appellee's brief, appellant is charged with making the contention that the contract is ambiguous, and that the custom is not in conflict with the terms thereof. It is either ambiguous or silent. The contract may be definite with regard to all other facts and features thereof, as the present one is, and still be ambiguous or

silent in regard to the particular issue involved in the present case.

Counsel next states that these contracts contain force majeure clauses, excusing the seller from performance if prevented by specified uncontrollable causes. If this is true, of course, the appellee is entitled to prevail on this point, because it is the issue in the case.

It has been determined, upon the reading of proof, that this brief will exceed in length, the twenty pages permitted under the court's rule. If it be felt by the court, the brief should not be extended beyond this limit, we conclude at this point with the proposition, as stated in our original brief, that the law regarding interpretation of the contract, and applicability of custom and usage requires a reversal of the trial court.

It is felt, however, that the additional matters, which have not been covered heretofore, will be of material assistance to the court, and if the limitation of the rule does not prevent, it is earnestly requested that the following appendix be considered by the court.

Respectfully submitted,

Bayley & Croson,

Allen H. McCurtain,

M. N. Eben,

Attorneys for Appellant.

APPENDIX

The proposition is next advanced by the appellee, that if it be assumed that the contracts be uncertain or incomplete as an original proposition, the fact remains that judicial interpretation has supplied the answer, and completed the contracts just as in the case of the endorser to a promissory note.

It was said, that no one for a moment would contend that it would be possible to introduce evidence that it was a custom and usage in a particular locality, or in a particular trade; that such an endorsement would subject the endorser to no obligation whatever. We have not made any extended search of authorities on this last proposition. In order, however, for the two cases to be similar, the controversy must have been between the endorser and the endorsee, so that the elements of holder in due course and good faith be eliminated. It then becomes a simple proposition. It is always possible, as between the immediate parties to such a transaction, to show that the endorsement was a limited one, as for example, that it was made simply for the purpose of transferring title. 8 *Corpus Juris,* page 378, Section 560, note 58; 8 *Corpus Juris,* page 357, Section 535; 8 *Corpus Juris,* pages 737 to 742, Sections 1015 and 1016. It has been repeatedly held that defenses are available to an endorsor, where the transferree does not hold as a bona fide holder, why not in the case at bar? A defense might arise by reason

of contemporaneously executed documents. It has been many times held, that custom and usage does not violate the parole evidence rule, that it simply supplies a term to the contract, which the parties are assumed to have had in mind. If, to come back to appellee's example, there *actually exists* a custom and usage affixing a different responsibility to such an endorsement, then it becomes simply an agreement of the parties, that the law has no right to tamper with, and so we assume the burden of saying that in a similar case we would contend that known general custom and usage would be available, to determine the obligation assumed by an endorser.

As a matter of history the Negotiable Instruments Law itself is the outgrowth of the usages of merchants. When, if ever, we reach a point where there has been a statute adopted, as in the case of negotiable instruments, fixing the rights and duties of the parties regarding performance after a strike it may be that the example cited will be appropriate. Even so, it will not help appellee's case, as it is permitted under the Negotiable Instruments Act, as between the parties, to show any contemporaneous and collateral agreement in defense which does not violate the parole evidence rule. Since custom and usage does not violate the rule, there is no reason in law or logic why it couldn't be shown to explain the intended obligation of an endorser.

At first blush, appellee's example seemed logical. We believe, however, it seemed so only because the example selected was one in which custom and usage, to establish an obligation different than that fixed by the negotiable instrument law, is so remote a possibility as to confuse the principle.

ANALYSES OF TESTIMONY IN RE CUSTOM

Turning now to the testimony of the witnesses, and the appellee's analyses thereof, on page 38 of the appellee's brief will be found a quotation of testimony of Mr. Penketh. Counsel has picked one word out of the quoted portion, the word "usually." Its brief states that the use of this one word is sufficient to qualify the entire quotation. A search of the transcript of testimony does not indicate that counsel found any qualification in the statement when the witness testified. Certainly the point was not developed on cross-examination. It is more likely that the word is used casually, without regard to any limitation counsel now seems to invest it with. The witness does not use the same nicety of expression, nor choose words so carefully when giving testimony, as counsel may do in writing a brief analytical of that testimony. We submit that in fact the whole of this witness' testimony does not indicate any limitation upon the applicability of the custom.

The testimony of Mr. Darling is next sought to be limited, on account of his statement, "It would

depend entirely upon the quantity involved, and the conditions that prevail after the strike or other impediment had been removed." We fail to see how his failure to state a custom with regard to the length of time that might be allowed under a custom for performance after the impediment had been removed can limit his testimony that the custom and usage contended for exists. We make no claim that custom fixes the time for performance after the impediment is removed. Our claim is simply that there is a requirement of performance under custom and usage, within a reasonable time after the impediment is removed, and this statement applies equally to the testimony of Mr. Haig, quoted on page 40 of appellee's brief, regarding the custom of 30 days. Counsel's analysis of this testimony, by saying "that the custom described is simply one to make delivery of the goods and it is not stated that there is any custom *requiring* delivery to be made," seems a mere quibble. If this distinction, based upon the use of the word "requiring" is a proper distinction, and one which is limiting in its effect, it would seem that it would have been noticed by counsel, and emphasized and developed in cross-examination. However, such was not the case. We believe the general testimony of this witness is clearly indicative of the requirement for delivery after the impediment is removed.

On page 46 of appellee's brief, the point is made that to permit a witness to testify what the general

custom is, in so far as it relates to clauses of similar import and tenor, to the one at bar, is to permit the witness himself to judge the similarity and legal effect, rather than the court. We believe this overlooks our primary contention on this subject matter. There is a custom and usage, so we contend, calling for deliveries after excusable impediments.

This custom and usage does not exist by reason of some contract, whatever its wording may be, but exists independently of any contract, and becomes a part of such contract, and is an overpowering term thereof, unless the particular contract negatives its application. Counsel does not seem to be able to get away from the thought that we are contending that the custom and usage overrides express provisions of the contract, or those necessarily implied therefrom, on the subject of performance, after termination of excusable impediments. This is not at all our contention. If custom and usage becomes a part of the contract, then it is in the contract just as effectively as if it were printed therein in words. Before such a term of the contract can be held to be non-applicable, it must of necessity be negatived by the use of language clearly indicating such an intention. Let us point out once and finally, that we make no claim that the custom and usage varies the terms of these contracts. Rather our claim definitely is that there is no discrepancy or inconsistency between the contract, and the custom and usage.

When a witness says, "True, I know of no custom and usage affecting a contract containing the language now before the court. However, I know of custom and usage on similar contracts," he is simply saying that there is a doctrine of custom and usage recognized in the trade, in contracts covering the purchase and sale of logs, as the one at bar. It is of no consequence, that he may not know, or the court may not have the identical contract before it, as all the court would be permitted to do, in any event, in the face of the existence of such custom, would be to determine whether or not the particular contract negatived its application in that particular case.

Respectively submitted,

BAYLEY & CROSON,

ALLEN H. MCCURTAIN,

M. N. EBEN,

Attorneys for Appellant